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IN THE
**SUPREME COURT OF THE
UNITED STATES**

Docket No. 8371

GEORGE S. MAY, d.b.a.
George S. May Company,
Plaintiff and Appellant,

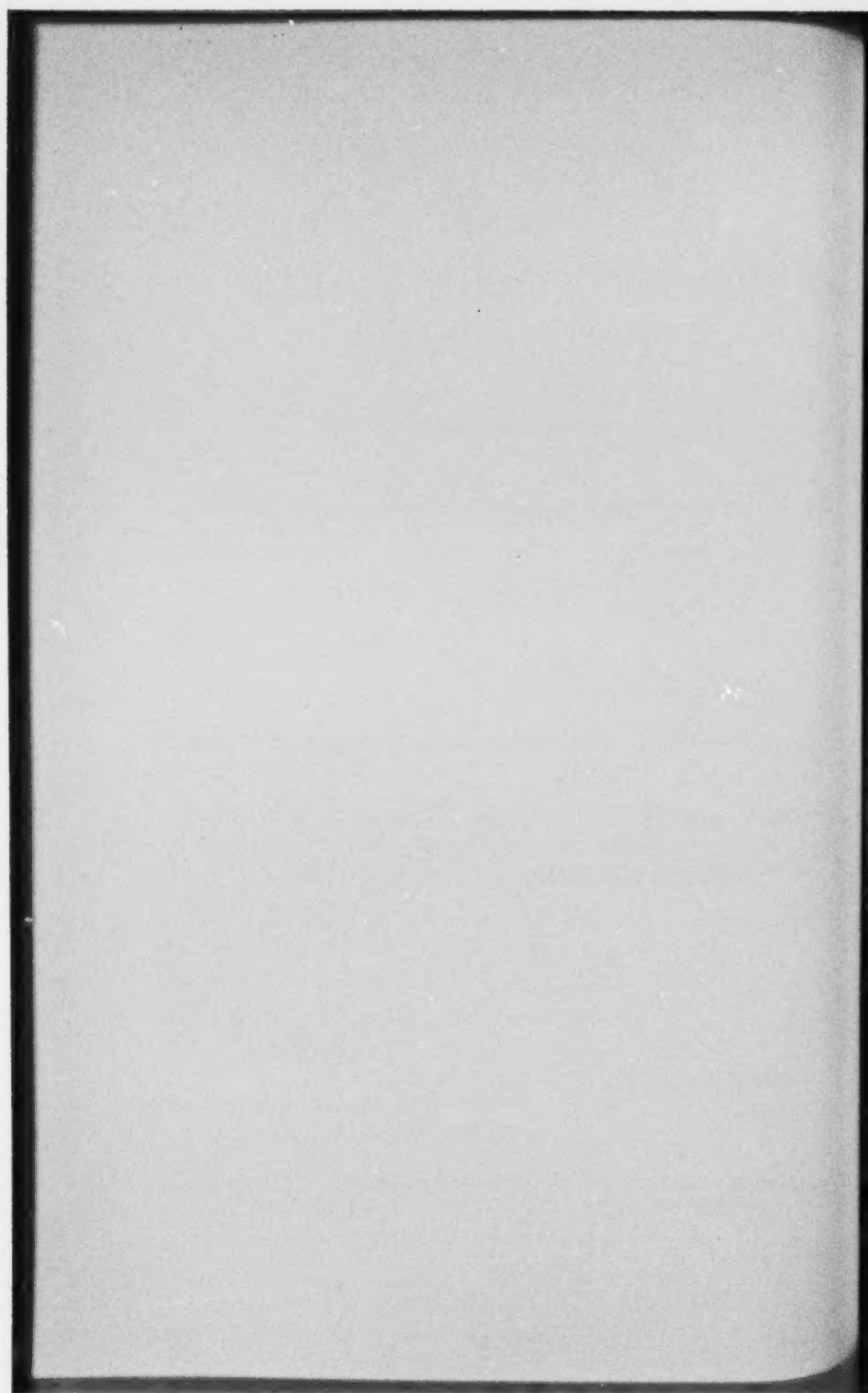
VS.

GEORGE V. R. MULLIGAN,
Defendant and Appellee.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES FOR THE WESTERN DISTRICT
OF MICHIGAN, SOUTHERN DIVISION**

HARRY C. HOWARD,
Attorney for Petitioner.
Business Address:
301-304 Kal. Nat'l Bank Bldg.,
Kalamazoo, Michigan.

AMERICAN BRIEF AND RECORD CO., GRAND RAPIDS, MICHIGAN



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IN THE
SUPREME COURT OF THE
UNITED STATES

GEORGE S. MAY, d.b.a.
George S. May Company,
Plaintiff and Appellant,
VS.
GEORGE V. R. MULLIGAN,
Defendant and Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES FOR THE WESTERN DISTRICT
OF MICHIGAN, SOUTHERN DIVISION

TO THE HONORABLE CHARLES EVANS HUGHES,
CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

George S. May, doing business as George S. May Company, your Petitioner, respectfully shows as follows:

I.

Summary and Short Statement of Matters Involved

Your Petitioner seeks a Writ of Certiorari to the Circuit Court of Appeals for the Sixth Circuit to review a decision

George S. May, d.b.a. George S. May Company, v George V. R. Mulligan, decided Nov. 8, 1940;

affirming a decree of the District Court for the Western District of Michigan dismissing the plaintiff's bill of complaint praying for an injunction and an accounting and money damages against the defendant for violation of a restrictive covenant in an employment contract.

The plaintiff is an industrial engineering firm engaged

in the business of installing systems covering sales, administrative expenses, budgetary controls, accounting and cost methods, production planning, inventory and other cost elements. The systems are installed by specially qualified and trained personnel, and during the existence of the plaintiff company it has served over 2,000 clients throughout the United States and Canada. The plaintiff company has developed solutions of particular industrial problems and communicates these solutions and systems to its employees, and also preserves these solutions in its confidential records available to its supervisory engineers. For the installation of such methods the plaintiff employs industrial engineers, both as installers and as supervisors, and it did on or about the 18th day of June, 1938, so employ the defendant as an installer.

Among other provisions the contract of employment provided as follows:

"4. Employee agrees that he will not, while this agreement remains in effect, or at any time within a period of two years from the date of cancellation or termination of this agreement —

"(a) ****

"(b) Enter into the employ of any individual, partnership, corporation, or associate corporations having interlocking Directors, who have or are about to become a client or clients of Employer" (R-10).

Shortly after the execution of this contract the Kalamazoo Stove & Furnace Company, of Kalamazoo, Michigan, became a client of the plaintiff company. By an agreement dated August 8, 1939 — slightly less than two months after the execution of the above employment contract with the defendant — the plaintiff company received authorization from the Kalamazoo Stove & Furnace Company to make a survey. This survey was made and submitted to the Kalamazoo Stove & Furnace Company on or about the 9th of September, 1938. Up to the time of the survey the Kalamazoo Stove & Furnace Company had actually lost money on its year's operations, whereas in the preceding two years it had made over \$1,000,000.00 per year.

Just prior to this survey the defendant Mulligan as an employee of the plaintiff company had been sent to Battle Creek, Michigan, to work on an installation system for the plaintiff at the A. B. Stove Company. Battle Creek, Michigan is located very close to Kalamazoo, being only 25 miles away. The President of the A. B. Stove Company and the President of the Kalamazoo Stove & Furnace Company are close personal friends, and the President of the Kalamazoo Stove & Furnace Company is financially interested in the A. B. Stove Company as a stockholder. In addition the Kalamazoo Stove Company had actually operated the A. B. Stove Company foundry under lease arrangement during the year preceding defendant's employment at that place.

In October, 1938, knowing that his employer, the plaintiff, was still working on the survey for the Kalamazoo Stove Company, and after talking with the manager of the plaintiff's Chicago office about the possibility of becoming the Supervisory Engineer on the Kalamazoo Stove Company job, and after then receiving a wage increase and promotion to Supervisory Engineer on the A. B. Stove Company job, the defendant Mulligan applied to the Kalamazoo Stove Company for employment. After several interviews he did on December 1, 1938, obtain a job with the Kalamazoo Stove Company. In his application for employment with the Kalamazoo Stove Company the defendant further stressed the fact that he had worked for the plaintiff company at two other stove companies, including A. B. Stove Company of Battle Creek. The President of the Kalamazoo Stove Company admittedly talked with his friend, Wendall Smith, President of the A. B. Stove Company, about the defendant prior to his hiring. As a direct result of the defendant's application to, and of his employment by, the Kalamazoo Stove Company, the defendant breached his contract with the plaintiff company, and the plaintiff company lost the Kalamazoo Stove Company job and a profit of \$4,000.00 thereon (R-54).

Plaintiff sought an injunction to prevent the defendant from violating his contract and continuing his employment with the Kalamazoo Stove Company, and plaintiff

also sought damages for its reasonable loss of profits occasioned by the defendant's breach of his agreement.

The District Court found that the agreement between the plaintiff and the defendant was illegal and void under a Michigan statute reading as follows:

"All agreements and contracts by which any person, co-partnership or corporation promises or agrees not to engage in any avocation, employment, pursuit, trade, profession or business, whether reasonable or unreasonable, partial or general, limited or unlimited, are hereby declared to be against public policy and illegal and void" (Sec. 16,667, C. L. of Mich. 1929).

At the time of the execution of the contract the parties were residents of Illinois and both parties were domiciled in Illinois; and at the time of the breach of the contract both parties were still citizens and residents of the State of Illinois with the defendant expressly charged with the duty of reporting weekly to the plaintiff.

The federal District Court refused to apply the rule of this U. S. Supreme Court as clearly set forth in

Hartford Acc. & Indem. Co. v. Delta Pine Land Co., 292 U. S. 143, 78 L. ed. 1178, 54 S. Ct. 634,

as follows:

"Conceding that ordinarily a state may prohibit performance within its borders even of a contract made elsewhere, if the performance would violate its laws, it may not, on the grounds of policy, ignore a right which has lawfully vested elsewhere, if, as here, the interest of the forum has but slight connection with the substance of the contract obligations."

Hartford Acc. & Indem. Co. v. Delta Pine Land Co., 292 U. S. 143, 78 L. ed. 1178, 74 S. Ct. 534.

Instead the District Court, applying the principles applicable to the ordinary domestic law of contracts, held that the contract was unenforceable as contrary to the public policy of Michigan. The Court refused to consider

whether or not the interest of the State of Michigan had any connection with the substance of the contract obligation. The Circuit Court of Appeals affirmed the District Court without filing an opinion.

II.

Statement of Jurisdiction

(1) The statute believed to sustain jurisdiction is U.S.C.A., Title 28, Sec. 347, Judicial Code, Sec. 240, as amended.

(2) The statute of the State of Michigan involved: — Sec. 16,667 of the *Compiled Laws of Michigan for 1929*, (§28.61 of *Mich. Stat. Annotated*):

“All agreements and contracts by which any person, co-partnership or corporation promises or agrees not to engage in any avocation, employment, pursuit, trade, profession or business, whether reasonable or unreasonable, partial or general, limited or unlimited, are hereby declared to be against public policy and illegal and void.”

Sec. 16,667, C. L. of Mich. 1929.

(3) Date of decree appealed from: Circuit Court of Appeals for the Sixth Circuit, November 8, 1940, affirming without opinion the decree of District Court for Western District of Michigan, dated June 15, 1939.

(4) *Nature of the case.* The contract sought to be enforced was prepared in Illinois, executed in Illinois, between citizens of Illinois, and was valid under the laws of Illinois. At the time of the breach of the contract both parties were still residents of Illinois.

The District Court, whose opinion was affirmed by the Circuit Court of Appeals for the Sixth Circuit without further opinion, held:

“The legislature of Michigan having declared such a restrictive provision as is here being considered to be ‘against public policy and illegal and void’, this

court may not set aside or ignore that declaration on the ground that the public interest in its enforcement is but slight. Judgment will therefore be entered in favor of defendant, and the complaint will be dismissed" (R-101).

The Supreme Court of the United States on the contrary has ruled as follows:

"Conceding that ordinarily a state may prohibit performance within its borders even of a contract made elsewhere, if the performance would violate its laws, it may not, on the grounds of policy, ignore a right which has lawfully vested elsewhere, if, as here, the interest of the forum has but slight connection with the substance of the contract obligations."

Hartford Acc. & Indem. Co. v. Delta Pine Land Co., 292 U. S. 143, 73 L. ed. 1178, 74 S. Ct. 534.

To the same effect are the following cases decided by this court:

Aetna Life Ins. Co. v. Dunken, 266 U. S. 389, 69 L. ed. 342 (holding that a statute of one state cannot be made to apply to a contract of life insurance which is entered into in another state);

Alaska Packers Ass'n. v. Industrial Acc. Comm., 294 U. S. 532, 79 L. ed. 1044.

This court held in the Alaska Packers case, *supra*, as follows:

"* * * a conflict (between the law of California and the law of Alaska) is to be resolved * * * by appraising the governmental interest of each jurisdiction and turning the scale of decision according to their weight."

Alaska Packers Ass'n. v. Industrial Acc. Comm., 294 U. S. 532, 79 L. ed. 1044

The district court refused to apply the following gen-

eral principles of conflicts of laws as announced in the cases above cited, and in the *Restatement of Conflicts of Laws* as follows:

"No action can be maintained upon a cause of action created in another state, the enforcement of which is contrary to the *strong* public policy of the forum."

Restatement of Conflicts of Laws, Sec. 612.

The opinion of the court as affirmed by the Circuit Court of Appeals for the Sixth Circuit is contrary to the rule as expressed in the U. S. Circuit Court of Appeals, Fourth Circuit, in *Citizens National Bank v. Waugh*, 78 Fed. (2nd) 325, wherein that court, following the U. S. Supreme Court decision of *Hartford Accident & Indemnity Co. v. Delta Pine Land Co.*, 292 U. S. 143, 78 L. ed. 1178, cited *supra*, said:

"Where a foreign contract is repugnant to good morals or where its enforcement would lead to disturbance and disorganization of the local municipal law, the courts will refuse to enforce it, as contrary to the public policy of the state of the forum. *Bond v. Hume*, 243 U. S. 15, 21, 37 S. Ct. 366, 61 L. ed. 565; *Parker v. Moore* (C.C.A. 45h) 115 F. 799. And they will on like ground refuse to enforce a foreign contract affecting local property rights of persons domiciled within the state where such contract contravenes the settled law of the forum. *Union Trust Co. v. Grosman*, 245 U. S. 412, 38 S. Ct. 147, 62 L. ed. 368. But they may not on grounds of public policy deny enforcement to a contract valid under the laws of the state where made in cases where the interest of the forum has but slight connection with the substance of the contract obligations."

Citizens Nat'l. Bank v. Waugh, 100 A.L.R. 941.

III.

Questions Presented

Will a Michigan statute be allowed to affect contracts made outside its borders by people not its citizens, and breached by persons not its citizens, when the interest of the State of Michigan has little or no connection with the substance of the contract?

The District Court (affirmed without opinion by the Circuit Court of Appeals for the Sixth Circuit) applied the Michigan law without considering the extent to which the State of Michigan was affected and without applying the rule of Conflicts of Laws as expressed by the U. S. Supreme Court, as follows:

"Conceding that ordinarily a state may prohibit performance within its borders even of a contract validly made elsewhere, if the performance would violate its laws (*Home Insurance Co. v. Dick*, supra, 281 U. S. 387, p. 408, 50 S. Ct. 338, 74 L. ed. 926, 74 A. L. R. 701) it may not, on grounds of policy, ignore a right which has lawfully vested elsewhere, if, as here, the interest of the forum has but slight connection with the substance of the contract obligations."

Hartford Acc. & Indem. Co. v. Delta Pine Land Co., 292 U. S. 143, 78 L. ed. 1178, 74 S. Ct. 534.

IV.

Reasons for Allowance of Writ

(1) The Circuit Court of Appeals for the Sixth Circuit, affirming the District Court, erroneously held that the Michigan statute per se prohibited enforcement of the contract, all as contrary to the general rules of Conflict of Laws as expressed by this court in the following cases:

Hartford Acc. & Indem. Co. v. Delta Pine Land Co., 292 U. S. 143, 78 L. ed. 1178, 74 S. Ct. 534;
Aetna Life Ins. Co. v. Dunken, 266 U. S. 389, 69 L. ed. 342;

Alaska Packers Ass'n. v. Industrial Acc. Comm.,
294 U. S. 532, 79 L. ed. 1044;

and

11 American Jurisprudence (Conflict of Laws), §126
which reads as follows:

"This doctrine (public policy) is subject to some limitations. Courts will refuse to enforce a foreign contract affecting local property rights of persons domiciled within the state where such contract contravenes the settled laws of the forum, *but they may not, on grounds of public policy, deny enforcement of a contract valid under the laws of the state where made in cases in which the interest of the forum has only a slight connection with the substance of the contract obligation.*"

11 American Jurisprudence, (Conflict of Laws),
Sec. 126, p. 416.

(2) The Circuit Court of Appeals for the Sixth Circuit erroneously refused to apply the general rule of Conflicts of Laws as above set forth.

(3) The decision of the Circuit Court of Appeals for the Sixth Circuit is in conflict with the settled decisions of the U. S. Supreme Court:

Hartford Acc. & Indem. Co. v. Delta Pine Land Co., 292 U. S. 143, 78 L. ed. 1178, 74 S. Ct. 534;
Aetna Life Ins. Co. v. Dunken, 266 U. S. 389, 69 L. ed. 342;
Alaska Packers Ass'n. v. Industrial Acc. Comm.,
294 U. S. 432, 79 L. ed. 1044.

(4) The decision of the Circuit Court of Appeals for the Sixth Circuit stands in conflict with a rule as announced by the Fourth Circuit in the *Citizens Nat'l. Bank v. Waugh*, 100 A. L. R. 941, as follows:

"* * * But they (the courts) may not on grounds of public policy deny enforcement to a contract valid under the laws of the state where made in cases where

the interest of the forum has but slight connection with the substance of the contract obligations.”

Citizens Nat'l Bank v. Waugh, 100 A.L.R. 941.

(5) The decision of the Circuit Court of Appeals of the 6th Circuit in the case at bar is that the courts must apply the statute of the forum without considering the public interest of the forum in its enforcement. Such a decision is manifestly in direct conflict with the decisions of the U. S. Supreme Court and that of the Circuit Court of Appeals for the Fourth Circuit, and if allowed to stand the rules will forever be in conflict.

(6) The Circuit Court of Appeals for the Sixth Circuit decided general questions of conflicts of laws contrary to the general rule and principles of conflicts of laws as announced by the following:

Restatement of Conflicts of Laws, Sec. 612;
11 American Jurisprudence, §126, p. 416;
Hartford Acc. & Indem. Co. v. Delta Pine Land Co., 292 U. S. 143, 78 L. ed. 1178, 74 S. Ct. 534;
Aetna Life Ins. Co. v. Dunken, 266 U. S. 389, 69 L. ed. 342;
Alaska Packers Ass'n. v. Industrial Acc. Comm., 294 U. S. 532, 79 L. ed. 1044;
Citizens Nat'l. Bank v. Waugh, 100 A. L. R. 941.

WHEREFORE your Petitioner prays that a Writ of Certiorari issue under the Seal of this Court directed to the Circuit Court of Appeals for the Sixth Circuit, commanding said court to certify and send to this court the following: A complete transcript of the records and proceedings in said court in the case numbered and entitled on its docket, No. 8371, George S. May, doing business as George S. May Company vs. George V. R. Mulligan, appellee, to the end that this cause may be reviewed and determined by this Court as provided by the statutes and evidence in said record contained, and that the judgment heretofore rendered by said Circuit Court of Appeals be reversed by

this Court, and that this Court grant such further and other relief as to this Court may seem proper.

Dated: January 14th, 1941.

GEORGE S. MAY, doing business
as Geo. S. May Company,
Petitioner
By HARRY C. HOWARD,
One of its Attorneys.
Business Address:
301-304 Kal. Nat'l. Bank Bldg.,
Kalamazoo, Michigan.

HARRY C. HOWARD,
Attorney for Petitioner.
Business Address:
301-304 Kal. Nat'l. Bank Bldg.,
Kalamazoo, Michigan.

STATE OF MICHIGAN,)
COUNTY OF KALAMAZOO) ss.

On this 14th day of January, A. D. 1941, before me personally appeared the above named HARRY C. HOWARD, and made oath that he had read the contents of the foregoing application for a Writ of Certiorari by him subscribed, and that he knows the contents thereof and that the same is true of his own knowledge, except as to the matters which are therein stated to be on his information and belief, and as to those matters he believes it to be true. And further, that he makes this application for and in behalf of the above named petitioner and that he is duly authorized so to do.

LOIS M. FIELD,
Notary Public, Kalamazoo
County, Mich.
My comm. exps., July 15, 1944.

(No supporting brief is filed with the petition as all recent authorities have been set forth in the petition.)